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and Decisions

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 143

(T.D. 86-143)

Special Procedures for Clearance of Cargo Carried by Courier or Express Air Services

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Customs is amending its regulations relating to the informal entry and clearance of merchandise transported by courier and express air services. The amendments will, for the first time, specifically make the informal entry procedures available to courier and express air services, and, with the exception of restricted and prohibited merchandise, and merchandise subject to quota or quantitative restraints, will apply to merchandise not exceeding $1,000 in value. Customs will provide expedited clearance procedures in recognition of the special needs of the growing courier and express air industry. The amendments will promote uniform, fair, and consistent treatment of the various courier and express air services, while at the same time ensuring the protection of the revenue in accord with all applicable laws and regulations.

EFFECTIVE DATE: August 21, 1986.

FOR FURTHER INFORMATION CONTACT: Jerrold O. Worley, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8151).

SUPPLEMENTARY INFORMATION:

Background

All imported merchandise entering the customs territory of the U.S. is subject to procedures relating to entry and clearance. The procedures ensure the proper appraisement, valuation, and tariff classification of the merchandise for the purpose of collecting the lawful amount of duties, as well as compliance with all other laws and regulations administered and enforced by Customs. Different

procedures are provided for the entry and clearance of merchandise depending upon its value. There are formal entry procedures set forth in Part 141, Customs Regulations (19 CFR Part 141), with certain exceptions, applicable to shipments valued in excess of $1,000, and informal entry procedures set forth in Part 143, Customs Regulations (19 CFR Part 143), for the most part limited to shipments valued at $1,000 or less.

Although the procedures for the informal entry of merchandise are less cumbersome and comprehensive than those for formal entry, they may still present an impediment to courier and express air services seeking to fulfill their obligations.

The most recent development in the express air industry is the planned rapid expansion of services from foreign locations to the U.S. These express air services fly into various hub cities in the midwest U.S. at which Customs has limited manpower, and at nontraditional business hours (generally between 10:00 p.m. and 3:00 a.m.). The interplay of these factors (the necessity for expeditious clearance of merchandise, and the limited Customs service available at the hub locales at off-peak time periods) necessitates the institution of special procedures applicable only to this industry.

The companies concerned are able to provide Customs with certain useful advance information on incoming international shipments. However, other information necessary for the normal entry process is not always available in advance of arrival, such as the importer number and tariff classification item number from the Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202).

In view of the special needs of the courier and express air industry and the inability to have access to complete advance information, by notice published in the Federal Register on October 21, 1985 (50 FR 42569), Customs proposed to amend Part 143, Customs Regulations (19 CFR Part 143), by setting forth new procedures to apply to courier and express air services. Specifically, § 143.21 would be amended to state that cargo transported by courier and express air services may use the informal entry procedures. Additionally, a new § 143.29 set forth the exact procedures applicable to these courier and express air services. The amendment provides that for shipments valued at $250 or less, an invoice or advance manifest must be presented to Customs which contains necessary information such as the shipper's address, name and address of the consignee, value and country of origin of the merchandise, and a description of the merchandise, prior to arrival of a shipment. Submission of this information is permitted as an accommodation to the courier and express air services, and will be submitted in lieu of the normal entry documents (Customs Form 3461, Application for Special Permit for Immediate Delivery; Customs Form 5119, Informal Entry). The amendment requires that for shipments valued over $250 but not more than $1,000, the previous information must

be supplemented by the addition of the appropriate TSUS item number for tariff classification purposes.

Section 321, Tariff Act of 1930, as amended (19 U.S.C. 1321), provides that in order to avoid expense and inconvenience to the Government which is disproportionate to the amount of revenue that would be collected, the Secretary of the Treasury is authorized to promulgate regulations to waive import duties on shipments valued at $5.00 or less in the country of shipment.

Accordingly, § 10.151, Customs Regulations (19 CFR 10.151), provides for the waiver of duty on such shipments, unless the district director has reason to believe that the shipment is one of several lots covered by a single order or contract and that it was sent separately for the express purpose of securing free entry, or of avoiding compliance with any pertinent law or regulation. To expedite the entry and clearance of shipments valued at $5.00 or less, under the amendment the courier and express air services will be required to segregate those shipments from others on the advance manifest, if the manifest is to be used as the entry document. The courier and express air services also will be required to present a properly executed Entry Summary (Customs Form 7501) within 10 days of filing an entry, with estimated duties attached. Finally, the amendment provides that Customs will accept an annual blanket Customs Form 3461, in which the importer of record assumes all liability for shipments released under the new expedited procedures. The blanket form will be required each year before a courier or express air service commences operations using the new procedures.

Analysis of Comments

The numerous comments received in response to the notice were submitted by Customs brokers, air express services, government offices, and members of Congress. A discussion of the issues raised and our response follows:

Many commenters stated that the proposal does not comply with the statutory requirements concerning parties legally authorized to submit written documentation for the entry of merchandise into the U.S. Section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), provides that only the owner, purchaser, or licensed broker may submit entry documentation. The commenters incorrectly perceived the proposal as allowing couriers or express air services to perform this function. The courier and express air services are merely nominal consignees who must designate licensed brokers to make entry of merchandise. The broker becomes the importer of record and the bond of the broker is liable for any deficiencies. Appropriate changes have been made to accurately reflect this point.

Many commenters expressed concern about the ability of Customs to maintain enforcement capabilities under the new procedures. Customs is aware of the potential for smuggling and other abuses. Customs currently conducts random intensive examinations

of merchandise from courier and air express shipments with the use of specially trained personnel and detector dogs, and will continue that practice. Further, audits will be conducted on the operations of the express companies and brokers to ensure that proper duty has been collected. Cooperative agreements are being negotiated with the companies which set forth specific preventative steps that can be taken to ensure that smuggling and other abuses are detected and reported to Customs.

Some parties questioned whether the new procedures might be used to circumvent quota or visa requirements on merchandise. The new procedures are not available for merchandise subject to any prohibition or restriction, or to quota or quantitative restraints, and individual entries must be filed for such articles. Full tariff data is required to be filed on the entry summary documentation so no statistical information will be lost.

Some commenters claim that the new procedure illegally creates different classes of merchandise based upon value and promotes unequal treatment of entries. Under § 498, Tariff Act of 1930, as amended (19 U.S.C. 1498), as amended by § 206 of Pub. L. 98–573, the Trade and Tariff Act of 1984, clear authority is established to prescribe regulations for the entry of merchandise valued at $1250, or less. In fact, different treatment already exists for different classes of informal entries. Passengers are allowed to list accompanied shipments on their baggage declaration, and mail shipments are examined and released on the basis of a simple declaration form on the package. This new procedure is designed to treat small express parcels in a fashion similar to that used for U.S. Postal Service parcels. The information on the commercial invoice is sufficient for examination and release purposes. The broker who files the entry must furnish the full entry summary within 10 days. We will audit brokers employed by the courier and air express industry to ensure that accurate information is supplied. The new procedures simply eliminate the need to prepare Customs documentation on numerous small shipments when the information required is already present on the existing commercial documentation.

Some parties have requested that Customs define courier or express air services. We are aware of no accepted international definition. However, generally, a courier company uses air passengers to carry shipments as baggage on an arriving international air carrier. An express air service ships the freight as air cargo. In both cases, the shipments are limited in size and weight, and the company is responsible for the door to door service to the ultimate consignee. The companies provide a complete "closed loop" transaction including Customs clearance through their brokers. Many of the air express companies use central facilities located in interior U.S. cities to clear the cargo through Customs, and route it to its ultimate destination. Airlines may establish small parcel express serv-

ices and use these procedures, provided they provide door to door service, including Customs clearance.

Comments were received concerning the impact the new rules will have on Customs inspectional manpower and overtime. Generally, service is provided equally to all parties based upon the volume of work and the availability of manpower. However, since service is provided at some express air companies at small inland ports outside of normal port hours and for the sole benefit of the party in interest, Customs is able to obtain complete reimbursement for the costs of personnel assigned, including salary, benefits, and administrative costs. These reimbursable positions are established in addition to the normal complement of Customs personnel assigned to these ports and will not result in a reduction of the level of service to other parties during normal business hours.

Some concern was expressed that the new procedure will give unfair benefits to private companies competing with the express service offered by the U.S. Postal Service. Customs provides officers for the clearance of postal shipments without reimbursement from the Postal Service. There have been complaints from the Postal Service because Customs officers are not usually assigned on weekends or at night. While this is true, it is noted that the private courier and express air services pay overtime or complete reimbursement for services provided outside of normal working hours. The Postal Service can obtain the services of a broker and pay the same charges as private companies.

In this time of Federal deficits and the need to reduce the operating costs of Federal agencies, Customs is not able to provide additional personnel for clearance without reimbursement. Private companies and the Postal Service are treated the same in so far as documentation is concerned. Postal shipments arrive with a postage declaration form affixed which contains less information than the commercial invoice, although the invoice is usually inside the package. The Customs officer at the mail facility makes a decision to examine a parcel based upon information on the declaration form. As in the case of mail shipments, the Customs officer at a private facility examines as many parcels as are necessary. A broker provides the necessary entry paperwork for shipments examined at private facilities, and is liable under his bond for any irregularities. In many ways, the procedure for the clearance of parcels for courier and express air services is more stringent than the procedure for postal parcels.

Several commenters suggested that Customs waive the collection of small amounts of duty on shipments under $25 in value or when $10 or less in duty is involved. As previously discussed in this document, 19 U.S.C. 1321 provides authority to waive duties on shipments valued at $5.00 or less. Congress would have to enact new legislation to enable Customs to waive entry on shipments over

$5.00 in value. It is noted that the costs of collection are minimized to Customs if all the appraisement work is done by a broker.

Several parties have asked Customs to revise the distinction made between shipments $250 and under and those over $250 but not more than $1,000. This distinction was made in the notice due to the special requirements for formal entries concerning sensitive commodities such as textiles. Customs still believes that there is a need to be provided with tariff item numbers for shipments valued over $250. However, we will review our experience in processing shipments under this procedure at a later date to determine if it is feasible to change this requirement. It was suggested that brokers making entries under the new procedure be specifically required to maintain records on their transactions. Customs brokers are already required to maintain records of all transactions pursuant to § 111.21, Customs Regulations (19 CFR 111.21), and to make these records accessible to Customs for audit. It is not necessary to create additional requirements.

It was also suggested that the new procedure be extended to formal as well as informal entries. The requirements for formal shipments are much more rigid than informal shipments. Customs needs additional information, such as tariff item numbers, in order to process a formal shipment through the new computerized Automated Commercial System (ACS) cargo selectivity program. The additional information requirements make Customs aware of other agencies' requirements and examination instructions. Brokers and importers may use the new Automated Brokers Interface (ABI) System in order to transmit entry data and receive timely notice of merchandise release status. Therefore, on both operational and legal grounds, the simplified procedures should not be extended to formal entries.

One commenter requested that the final rule on this matter be delayed until a decision is made on another proposal concerning consolidated shipments. That project, which was published in the Federal Register on December 24, 1985 (50 FR 53532), concerns the right of a nominal consignee to designate a broker if the shipper or owner specifies a different broker, or the consignee wishes to make entry on his own behalf. This is a particular problem when a freight forwarder handles a consolidated shipment consisting of many house bills traveling under one master bill.

While the consolidated shipment proposal is a related matter, it does not directly impact upon this new procedure. The nominal consignee, in this case the courier or air express service, is assumed to have the right to designate a broker. If he does not have that right, the procedure cannot be used by the broker of the courier or air express service. A decision on the consolidated shipment project will be the subject of another Federal Register document.

One commenter asked that the air waybill document of a particular courier service be accepted as the entry/release document

in lieu of the commercial invoice, since it contains an invoice section. This proposal cannot be accepted because the person who completes the air waybill may not be the actual shipper or manufacturer who prepares the commercial invoice. Customs needs the precise data contained on the commercial invoice. However, Customs is willing to accept facsimile invoices or an advance manifest prepared by the automated system of the courier or air express company.

Some commenters questioned the statement in the proposal that the amendment would not have a significant economic impact on a substantial number of small entities under the terms of the Regulatory Flexibility Act. They are apparently concerned about the competitive effect of the proposal on brokers, freight forwarders and other similar organizations, although no specifics are provided.

The purpose of the amendment is clearly explained in the document. Customs does not believe that the amendment will have a significant effect on the business of these groups. Courier and express air service companies must still use a licensed broker to transact Customs business. Some brokers may obtain more business, others less, regardless of this change. We are not aware of any significant impact on freight forwarders or other "similar organizations".

A final issue for consideration is the problem of the proper control of entries at central courier facilities, such as those which are being established at JFK Airport in New York, and at Miami International Airport. Numerous courier services and their brokers will use these facilities, and it will be difficult to ensure that the necessary Entry Summary (CF 7501) is filed within 10 days for the cargo released under the new informal entry procedures. Customs uses the entry number on the Application for Special Permit for Immediate Delivery (CF 3461) as the control mechanism to ensure that entry summaries are presented in a timely manner. This is done through the Customs computerized cargo selectivity system. It would be too labor intensive to maintain a paper control system for the many informal shipments released by brokers at a centralized courier facility. Therefore, at such locations, the district or area director may require a CF 3461 for each day's or each flight's informal entries released under this procedure. The CF 3461 will be completed except for the description of the merchandise. The commercial invoices or advance manifest will be attached to the CF 3461. The CF 3461 will contain a notation that it covers various informal entries released under § 143.29, Customs Regulations (19 CFR 143.29). The CF 3461 should also indicate the total number of invoices attached. This will meet the control objectives of Customs without sacrificing the benefits of reduced documentation.

After consideration of the numerous comments received in response to the notice, and following further review of the matter, it

has been determined advisable to adopt the proposal with minor modifications.

EXECUTIVE ORDER 12291

This is not a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

REGULATORY FLEXIBILITY ACT

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 301 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 143

Customs duties and inspection, Imports.

AMENDMENTS TO THE REGULATIONS

Part 143, Customs Regulations (19 CFR Part 143), is amended as set forth below:

PART 143—CONSUMPTION, APPRAISEMENT, AND INFORMAL ENTRIES

1. The authority citation for Part 143 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.21 is amended by adding, at the end thereof, a new paragraph (1) to read as follows:

§ 143.21 Merchandise eligible for informal entry.

* * * * * * *

(1) Cargo transported by courier and air express services not exceeding $1,000 in value, with the exception of prohibited and restricted merchandise, merchandise subject to quota or quantitative restraints, or in any instance in which the district director may require formal entry under § 143.22 of this Part. (See § 143.29 of this Part).

3. Part 143 is amended by adding a new § 143.29, to read as follows:

§ 143.29 Special informal entry procedures for cargo transported by courier and express air services.

This procedure is available for accompanied or air shipments not exceeding $1,000 in value imported by courier and express air services, with the exception of prohibited and restricted merchandise, merchandise subject to quota or quantitative restraints, or in any instance in which the district director may require formal entry under § 143.22 of this Part.

(a) *Shipments valued at $250 or less.* To obtain expedited clearance under this section, the party with the right to file entry shall submit a copy of the invoice or advance manifest containing necessary information including name and address of the shipper, name and address of the consignee, value of the merchandise, country of origin of the merchandise, and description of the merchandise. The completed invoice or advance manifest will be accepted by Customs in lieu of a Customs Form 3461 (Application for Special Permit for Immediate Delivery), or Customs Forms 7501 or 5119 (Informal Entry), as the entry control document.

(b) *Shipments valued in excess of $250 and not exceeding $1,000.* In addition to the information required on the documentation specified in paragraph (a) of this section, the appropriate item number from the Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), must be furnished for classification purposes.

(c) If an advance manifest is used as the entry document, shipments valued in excess of $5.00 must be segregated from those valued at $5.00 or less.

(d) Within 10 days of the filing of the entry, the Entry Summary (Customs Form 7501) must be presented, in proper form, with estimated duties attached.

(e) An Application for Special Permit for Immediate Delivery (Customs Form 3461), appropriately modified to cover all importations under the special procedures provided in this section for a period of 1-year, shall be submitted to the district director before the procedure permitted by this section shall be commenced by the courier or air express service.

(f) *Centralized courier facilities.* At airports with high volumes of accompanied courier traffic at a central facility with numerous couriers and their brokers, the district director may require an individual Application for Special Permit for Immediate Delivery (Customs Form 3461), from the brokers representing each courier and covering the various eligible shipments per day or per flight. The commercial invoices or advance manifests will be attached to the Customs Form 3461 which will contain the entry number and other necessary information. In lieu of a description of the mer-

chandise, a notation will be inserted indicating that the entry covers multiple shipments in accordance with this section.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 22, 1986 (51 FR 26243)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 141

Proposed Customs Regulations Amendment Relating to Entry Documentation Filing

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide an optional procedure under which importers could file entry documentation at one port to be analyzed by Customs to determine if an examination of the cargo is necessary. If no examination is necessary, the merchandise could be released when it arrives, even at another port. This would enable importers to obtain an expedited release of their merchandise. Expediting the clearance of cargo would benefit importers, carriers, and Customs.

DATE: Comments must be received on or before September 22, 1986.

ADDRESS: Comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Jerrold O. Worley, Office of Cargo Enforcement and Facilitation (202-566-8151);

Legal Aspects: Jerry C. Laderberg, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

Background

Parts 141 through 144, Customs Regulations (19 CFR Parts 141-144), govern the entry of imported merchandise. Release of the merchandise from Customs custody is secured by filing the entry documentation required by §§ 142.3 *et seq.*, Customs Regulations (19 CFR 142.3 *et seq.*).

If merchandise is imported at one port and the importer of record desires to have the merchandise delivered to another port (usually where the importer's premises are located), there are two alternatives available to the importer. He may make entry by submitting entry documentation at the port where the merchandise has arrived, either in person or through an agent, to obtain release of the merchandise at that port. He then makes arrangements for transportation of the merchandise to the inland location, free of any Customs control or custody of the merchandise. Alternatively, the importer may make arrangements at the port of arrival to have the merchandise transported under Customs bond from that port to the destination port, utilizing the transportation in-bond procedures of §§ 18.1 *et seq.*, Customs Regulations (19 CFR 18.1 *et seq.*). These procedures entail using a Customs bonded carrier for the transportation process and complying with the documentary and sealing requirements of Parts 18 and 24, Customs Regulations (19 CFR Parts 18, 24). When the merchandise arrives at the destination port, the importer makes entry by filing the appropriate documentation. He then may obtain release of the merchandise.

Under a program known as PAIRED (Port of Arrival Immediate Release and Enforcement Determination), which has been tested at a number of locations in the U.S., importers are allowed to file entry documentation at one port, usually an inland or interior location, to be analyzed by Customs to determine if an examination of the cargo is necessary. With the permission of the district director at the inland port, the importer files such documentation as is necessary to enable Customs to decide if the merchandise may be released or if it must be retained in Customs custody for reasons such as examination or extraction of a sample for an admissibility determination, verification of manifest, etc. The documentation is usually submitted before the merchandise has arrived in the U.S. Then, if no examination or extraction is required, the importer or broker is notified that the shipment can be released upon arrival. The shipment may then proceed directly to its intended destination without going to another Customs port for further Customs processing. Thus, the importer will receive his shipment more expeditiously and with fewer transportation costs.

Customs experience with the PAIRED program, which is voluntary on the part of importers, has demonstrated that it benefits importers and carriers by expediting the delivery of merchandise and reducing congestion at the port of arrival. Approximately 80% of all entries under PAIRED are released immediately at the port of arrival, without the need for examination of the merchandise or in-bond transportation to another port. It benefits Customs by reducing the costs and expenditures of manpower and other resources for maintaining the transportation in-bond system.

Section 484(a)(2)(A), Tariff Act of 1930, as amended (19 U.S.C. 1484(a)(2)(A)), requires that an entry be filed at a place within the

Customs-collection district where merchandise covered by the entry will be released from Customs custody. Release occurs whenever Customs determines that it has no further need to maintain actual custody of the merchandise. Under the PAIRED program, this occurs at the port where the entry documentation is filed (usually an inland port). Entry filing at an inland port and release of the merchandise by the appropriate Customs officer at that port (which order is thereby conveyed to the arrival port) is therefore consistent with 19 U.S.C. 1484(a)(2)(A).

Examination of merchandise entered under the PAIRED program may occur either at the port of arrival or the port of destination of the merchandise. Such examination is authorized by § 499, Tariff Act of 1930, as amended (19 U.S.C. 1499). Pending the examination, the merchandise may not be released from Customs custody.

PROPOSAL

To implement the PAIRED program in all Customs districts, it is proposed to amend § 141.63, Customs Regulations (19 CFR 141.63), relating to the submission of entry documentation for preliminary review. A new paragraph (c) would be added to § 141.63, allowing an importer to request the district director to approve the filing of entry documentation at a port other than the port of arrival of the merchandise, to obtain release of the merchandise at the port of arrival. The use of this procedure would be optional on the part of the importer.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 141

Customs duties and inspection, Imports, Entry documentation filing.

PROPOSED AMENDMENT

It is proposed to amend Part 141, Customs Regulations (19 CFR Part 141), as set forth below.

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 would continue to read as follows:

AUTHORITY: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 141.63 by adding a new paragraph (c) to read as follows:

§ 141.63 Submission of entry summary documentation for preliminary review.

* * * * * * *

(c) *For merchandise entered other than at port of arrival.* If merchandise is to arrive or has arrived at one port and the importer wishes to file his entry documentation at another port to which the merchandise is destined, he may do so upon approval of the district director at the port of destination. The district director at the destination port may then authorize release of the merchandise, after its importation at the port of arrival, or postpone its release if he believes it is necessary for examination or other purposes.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 2, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 22, 1986 (51 FR 26266)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

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159-254 0 - 86 - 2

Decisions of the United States Court of International Trade

(Slip Op. 86-68)

BADGER-POWHATAN, A DIVISION OF FIGGIE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, RUBINETTERIE A. GIACOMINI, S.P.A., INTERVENOR

Court No. 85-4-00467

OPINION

[Intervenor's motion for stay pending appeal denied.]

(Decided June 27, 1986)

Stewart & Stewart (Eugene L. Stewart and *Terence P. Stewart)* for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Civil Division, Department of Justice, for defendant.

Klayman & Gurley, P.C. (Larry Klayman) for intervenor.

RESTANI, *Judge:* Intervenor Rubinetterie A. Giacomini, S.P.A. (Giacomini), moves for a stay of enforcement of this court's opinion and order remanding this case to the Department of Commerce International Trade Administration (ITA) for issuance of an amended final determination and corresponding antidumping duty order. CIT Rule 62(d) (provides for stays pending appeal upon filing of supersedeas bond); *Badger-Powhatan* v. *United States,* 10 CIT ——, Slip Op. 86-38 (Apr. 2, 1986), *appeal docketed,* No. 86-1251 (Fed. Cir. May 13, 1986). Plaintiff Badger-Powhatan opposes the motion. Defendant ITA does not oppose the motion.

In the appealed opinion, the court held that ITA erred in failing to recalculate the less than fair value (LTFV) margin of certain brass fire protection products imported from Italy, after the International Trade Commission determined that only a subclass of the class of merchandise sold at LTFV is causing material injury to an industry in the United States. ITA was ordered to recalculate the margin based on information available in the agency record. An amendment to the final determination and antidumping order containing the recalculated margin was issued on May 15, 1986. 51 Fed. Reg. 17,783 (1986).

Defendant ITA contends that intervenor's appeal prevents ITA from implementing the latest final determination and antidumping

duty order until a final judicial decision has been reached, citing *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924 (Fed. Cir. 1984). In *Melamine,* the Court of Appeals for the Federal Circuit held that "[a]bsent an injunction of liquidation, 19 U.S.C. § 1516a requires that the challenged determination shall govern the liquidation of entries 'while the litigation is proceeding.'" *Id.* at 934 (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 248, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 634).[1] The court also indicated that a "final court decision" would govern over the challenged determination. The court notes that *Melamine* involved the question of whether a challenged negative determination of the agency should govern the process of liquidation pending appeal of a decision rescinding the determination. It did not address the question raised by intervenor of whether the agency should undertake other administrative procedures consistent with appealed CIT opinions. Whether or not the decision reached by the CIT here may be considered a controlling final court decision, nothing in *Melamine* prevents ITA from amending the final determination and order at this point in the proceedings, as it has done, and, as discussed *infra,* the agency must implement its new determination.

The essential issue here is which agency determination governs the amount of estimated antidumping duties importers must deposit on entries occurring between the time of this court's order and the last judicial decision rendered in this case. The court rejects defendant's contention that *Melamine* mandates a stay pending appeal in this case, for at least two reasons. First, *Melamine* addressed the issue of when a challenged determination should govern the process of *liquidation,* pursuant to section 1516a(c)(1). This provision does not apply in this case because neither of the determinations here will result in any immediate liquidations. In the instant case, duties will not actually be assessed until after the first annual review is completed, and that annual review may alter the results of the present determinations. *See* 19 U.S.C. § 1675(a) (1982).[2] Therefore, it is incorrect to assume that the antidumping determination and order will govern liquidation if no stay pending appeal is granted. Because *Melamine* involved a challenged final negative determination, liquidation could have occurred at any time following issuance of the determination. The CIT's recision

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[1] 19 U.S.C. § 1516a(c)(1) (1982) reads in pertinent part:

> Liquidation in accordance with determination.—Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with [such] determination * * * if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination.

[2] In 1984, 19 U.S.C. § 1675(a)(1) was amended to only require periodic review "if a request for such a review has been received." Pub. L. No. 98-573, § 611(a)(2)(A), 98 Stat. 3031 (1984) (codified as amended 19 U.S.C. § 1675(a)(1) (Supp. II 1984)). This amendment is only applicable to investigations initiated on or after October 30, 1984. Pub. L. No. 98-573, § 626(b)(1), 98 Stat. 3042 (1984). Plaintiff filed the antidumping petition in this case on January 3, 1984. Consequently, the 1984 amendments are not applicable and a review of the order must be conducted at least once during "the 12-month period beginning on the anniversary of the date of publication [of the] antidumping duty order" pursuant to the 1982 version of the statute.

order and subsequent suspension order interfered with this liquidation process. Such a late imposed suspension is not the equivalent of an injunction which results from a fully considered motion for preliminary injunction, sought at the outset of a case. The *Melamine* court stated it was concerned about a "yoyo" effect on liquidations. *Melamine,* 732 F.2d at 934. In *Melamine,* liquidations were subject to a start-stop effect. In this case, no liquidation could have occurred and none will occur until the annual review is completed.

Second, this case presents an unusual situation in which subsequent to plaintiff's filing of suit challenging a final determination, ITA altered its position to agree with plaintiff that the challenged determination was incorrect. If intervenor had not already entered the suit on behalf of ITA's original position, the case would have been dismissed and defendant would have recalculated the LTFV margin in precisely the way it has now done pursuant to the court's order. Inasmuch as ITA now acknowledges that the challenged determination was incorrect, requiring deposits to be made in accordance with that determination constitutes deference to a position supported only by intervenor, and disavowed by both the agency and the court. Although the court finds *Melamine* not controlling on the issue of the amount of deposit required, the *Melamine* facts present an interesting parallel to the facts at hand. In *Melamine,* ITA initially issued an affirmative final determination. On reconsideration, and after a hearing and additional briefing, ITA amended its original findings. This amended final negative determination was the subject of the suit. *Melamine,* 732 F.2d at 925. The Federal Circuit considered this amended determination to be the determination which controlled the liquidation process. *Id.* at 934–35. For purposes of the pending motion, the court finds no basis for distinguishing between a determination which is amended by the agency on its own because of errors in the original determination and one which is amended after the court agrees with the agency that amendment is necessary. Thus, even if *Melamine* has broader application than the court believes it does, that is, that the rule of *Melamine* applies to the entire entry process, a stay pending appeal is not required in this case. Given these factors, the court finds that the most recent determination and order must govern the amount of deposits to be made while the appeal is pending, unless a stay of the judgment is appropriate under CIT Rule 62 or otherwise.

As indicated, intervenor contends that it is entitled to a stay of the judgment as of right under CIT Rule 62(d). Rule 62(d) provides that a party who has appealed "may obtain a stay" by giving a supersedeas bond.[3] This language is generally interpreted as standing

[3] CIT Rule 62(d) reads as follows:
(d) Stay Upon Appeal. When an appeal is taken, the appellant, by giving a supersedeas bond, may obtain a stay subject to the exception contained in subdivision (a) of this rule. The bond may be given at or after

Continued

for the proposition that "the appellant who files a satisfactory supersedeas bond [is entitled] to a stay of money judgment as a matter of right." *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association,* 636 F.2d 755, 759 (D.C. Cir. 1980) (emphasis omitted) (citing *American Manufactures Insurance Co.* v. *American Broadcasting Paramount Theatres, Inc.,* 87 S. Ct. 1, 3 (1966) (Harlan, J., Circuit Justice)); *see American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT ——, Slip Op. 85–104 at 4 (Oct. 7, 1985). *Compare J. Perez & Cia, Inc.* v. *United States,* 578 F. Supp. 1318, 1320 (D.P.R.) ("Traditionally, the supersedeas bond has been confined to money judgments from which a writ of execution can issue.") (citing *Harvey* v. *McDonald,* 109 U.S. 150 (1883)), *aff'd,* 747 F.2d 813 (1st Cir. 1984) *and* 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 62.06 (2d ed. 1985) ("Under Rule 62(d), a party taxing an appeal from a money judgment rendered against him in a district court can stay proceedings to enforce that judgment pending appeal by furnishing a supersedeas bond.") *with Donovan* v. *Fall River Foundry Co.,* 696 F.2d 524, 526 (7th Cir. 1982) ("The reference in Rule 62(d) to supersedeas bond suggests that had the framers thought about the point they would have limited the right to automatic stay to cases where the judgment being appealed from was a 'money judgment.'").

Intervenor contends that the order of this court in Slip Op. 86–38 is a money judgment because "it will result in the payment of additional amounts of antidumping duty deposits on future entries of pressure restricting valves and siamese connectors." Memorandum in Support of Intervenor, Rubinetterie A. Giacomini, S.P.A., for Stay Pending Appeal at 3. Plaintiff argues that such is not the case because this court's order "did not itself grant a money judgment, or even calculate and impose estimated duties." Plaintiff's Opposition to Intervenor's Motion for Stay Pending Appeal at 4.

A money judgment "adjudges a defendant * * * absolutely liable to pay a sum certain to the plaintiff, * * * awards execution therefor, and * * * may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs." *Fuller* v. *Aylesworth,* 75 F. 694, 701 (6th Cir. 1896). Initially, the court notes that the judgment in this case does not comport with this classic definition.[4] As noted *supra,* the final determination and

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the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

The exception contained in subdivision (a) referred to in Rule 62(d) relates to actions seeking injunctions and is thus not relevant to this action.

[4] *Zenith Radio Corp.* v. *United States,* 2 CIT 8, 518 F. Supp. 1347 (1981), cited by intervenor as support for the proposition that the judgment in the instant case is a "money judgment," is inapposite. First, the rule at issue in *Zenith* was CIT Rule 65(c). Id. at 8 & n.1, 518 F. Supp. at 1348 & n.1. This rule requires the posting of security as a prerequisite to injunctive relief. The purpose of this security is to provide recoverable damages that arise from operation of the injunction itself, not from damages occasioned by the underlying suit. *Lever Bros. Co.* v. *International Chemical Workers Union, Local 217,* 554 F.2d 115, 120 (4th Cir. 1976). Thus, the fact that the court required the *Zenith* plaintiff to post security in an antidumping suit does not indicate that the court considered the suit one for a money judgment. Second, at issue in *Zenith* was the propriety of a $77 million settlement between the Secretary of Commerce and importers for uncollected antidumping duties. 2 CIT at 8, 518 F. Supp. at 1348. Litigating the propriety of a settlement in an antidumping case is fundamentally different from litigating the proper calculation of the antidumping deposits.

antidumping duty order will not result in the actual assessment of antidumping duties, rather importers will be required to deposit estimated antidumping duties. 19 U.S.C. § 1673e(a)(3) (1982). The permanent exchange of money will occur only after a periodic review of the duty. *See supra* note 2 and accompanying text. Moreover, the use of a supersedeas bond to stay the remand order in this case would not further the policy considerations underlying Rule 62(d).

"The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal." *Poplar Grove Planting and Refining Co.* v. *Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190–91 (5th Cir. 1979). The bond protects a judgment debtor from the risk of satisfying the judgment, only to be unable to obtain restitution if reversal occurs on appeal. *Id.* at 1191. Likewise, the bond secures the judgment creditor against the possibility of loss sustained as a result of being forced to forego execution on the judgment during the course of an ineffectual appeal. *Id.* As noted above, the order challenged in this case remanded the case to ITA for issuance of an amended final determination and antidumping duty order requiring certain deposits. *Badger-Powhatan* v. *United States*, 10 CIT ——, Slip Op. 86–38 (Apr. 2, 1986), *appeal docketed*, No. 86–1251 (Fed. Cir. May 13, 1986). This order is not, however, the type of money judgment for which an automatic stay is warranted for the purposes of Rule 62(d). First, as plaintiff notes, intervenor is not responsible for paying antidumping duties or interim deposits. For that reason, among others, no judgment may be entered directing intervenor to pay a specific sum. The responsibility for eventual payment falls to the importers of intervenor's goods. 19 U.S.C. § 1673g (1982).[5] Such importers are not parties to this suit. The filing of a bond by *intervenor* will not guarantee the payment of the duties by those required to pay, and the statutory scheme is carefully designed to require payment from importers, so that the equalizing purposes of the act are carried out. *See* 19 U.S.C. § 1673g(b) (3), (4) (1982) (importer must state under oath that "he is not an exporter, or if he is an exporter," must indicate the exporter's sales price of the merchandise and must pay, or agree to pay on demand, antidumping duties); S. Rep. No. 249, 96th Cong., 1st Sess. 37, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 423 (Dumping is one of "the most pernicious practices which distort international trade to the disadvantage of United States commerce. * * * Antidumping duties are special duties imposed to offset the amount of the difference between the fair value of the merchandise and the price for which it is sold in the United States, *i.e.*, the dumping margin."). Second, as indicated by such legislative history, the antidumping act is not designed to compensate plain-

[5] Intervenor notes that the domestic importers of Giacomini's pressure restricting valves and siamese connectors are already fully bonded for the payment of any and all customs duties to the U.S. government. Presumably Customs is requiring bonds sufficient to cover the deposits for duties as formerly calculated. There is no evidence that the bonds will cover the newly calculated duties. In any case, this factor is irrelevant, as demonstrated by the discussion in the text.

tiff directly for damages or to raise revenue for the United States. Posting a bond here, therefore, would not preserve for the prevailing parties the benefits of the court's decision applying the antidumping laws. Thus, the posting of a bond will not serve any of the purposes that normally make a stay as of right available when a money judgment is involved.

Having determined that intervenor is not entitled to a stay as of right, the court must determine whether intervenor has demonstrated that it is entitled to a discretionary stay. In determining whether the interests of justice will be served by the grant of a stay, the court must consider the following four factors:

> (1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceeding, and (4) wherein lies the public interest.

Philipp Brothers, Inc. v. *United States,* 10 CIT ——, Slip Op. 86–67 at 2 (June 27, 1986) (quoting *McSurely* v. *McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982), *cert. denied,* 106 S. Ct. 525 (1985)).

The court finds the first factor to be of limited significance in this determination. While intervenor's argument is not frivolous, the court has no reason to doubt the validity of its original holding. *See Philipp Brothers,* 10 CIT at ——, Slip Op. 86–67 at 9; *American Grape Growers Alliance for Fair Trade* v. *United States,* 9 CIT ——, Slip Op. 85–104 at 5–6 (Oct. 7, 1985). Thus, the focus of the court's discussion will be on the remaining factors.

The second, and critical, factor requires the movant to affirmatively demonstrate that it will suffer irreparable harm unless the stay is granted. Intervenor has not even attempted to meet this burden, stating that granting the stay "would work no harm or prejudice to any party." Memorandum in Support of Motion of Intervenor, Rubinetterie A. Giacomini, S.P.A., for Stay Pending Appeal at 7. Intervenor has not met its burden of claiming irreparable harm, much less its burden of substantiating the claim. *See Wisconsin Gas Co.* v. *FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

Furthermore, the mere statement that no party will be harmed is insufficient to satisfy intervenor's burden of establishing that the stay will not harm any other party. *Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Association,* 409 F. Supp. 233, 268 (W.D. Mo.), *aff'd,* 532 F.2d 615 (8th Cir. 1976). In fact, if anything, this factor weighs against intervenor, in that plaintiff has argued in its brief that it will suffer harm if a stay is granted. Intervenor has not disputed this claim. Thus, intervenor has also failed to provide any basis for a finding in its favor on the third factor, that of absence of harm to parties other than the movant if the stay is granted.

Finally, intervenor claims that granting of a stay would be in the public interest because it would facilitate a lawful appeal without

causing harm to any party. Even if there is no such harm, this argument virtually eliminates the fourth factor as a useful standard and overlooks the fact that "[a] stay pending appeal is always an extraordinary remedy." *Golden Eagle Refining Co.* v. *United States*, 4 Cl. Ct. 622, 624 (1984) (quoting *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *National Mediation Board*, 374 F.2d 269, 275 (D.C. Cir. 1966)). There is some public interest in denying stays pending appeal "because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party." *Dellums* v. *Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984); *see also Philipp Brothers, supra*, 10 CIT at ——, Slip Op. 86-67 at 12. Intervenor has offered no substantial public interest reason for the granting of a stay. In its own words, no party will be harmed by the granting of, or the denial of, a stay. In such a situation the public interest in following the ordinary methods of proceeding must prevail.

Intervenor has failed to demonstrate that a stay is available as a matter of right or should be granted at the discretion of the court. Intervenor's motion for a stay pending appeal is denied.

(Slip Op. 86-69)

M.W. KASCH CO. AND THE TSAISUN INC. D/B/A JRL TOYS, PLAINTIFFS *v.* UNITED STATES AND WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 86-05-00579

OPINION AND ORDER

[Plaintiffs' application for a preliminary injunction denied; defendants' motion to dismiss denied.]

(Dated July 10, 1986)

Grunfeld, Desiderio, Lebowitz & Silverman (Robert B. Silverman and *Michael P. Maxwell)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice for the defendants.

AQUILINO, *Judge:* The plaintiffs commenced this action to obtain the release of goods detained by the U.S. Customs Service and to enjoin the Commissioner of Customs "from issuing a determination that the copyright registration for JRL Toys for its 'LONELY PUPPY' is invalid or that the 'LONELY PUPPY' is a piratical copy of Tonka Corp.'s copyrighted 'POUND PUPPY' ", to quote from their complaint's prayer for relief.

BACKGROUND

According to the complaint, M.W. Kasch Co. is the importer of record of the merchandise at issue herein. The Tsaisun Inc. d/b/a JRL Toys ("JRL") is alleged to have created the "Lonely Puppy", which is characterized as a stuffed-animal toy derived from JRL's "Napping Beagle". A Certificate of Copyright Registration was issued for the Lonely Puppy in or about March 1986.

Prior thereto, however, the complaint alleges that Tonka Corporation registered a copyright in February 1985 for a "stuffed dog marketed as the POUND PUPPY" (para. 7); that in July Tonka filed an application to record its copyright with Customs (para. 8); that JRL requested in October a Service ruling that the Lonely Puppy does not infringe Tonka's copyright (para. 11); that in November Tonka commenced an action against JRL in the United States District Court for the District of Minnesota, Third Division, Civil File No. 3-85-1885, alleging copyright infringement (para. 13); that Customs recorded Tonka's copyright in December (para. 14); and that in February 1986 the Service seized shipments of JRL's toy (paras. 15, 16).

JRL sought injunctive relief from the district court. However, the judge entered an order, denying the requested relief and stating, in part:

> * * * Any challenge to the authority of Customs to act under 19 C.F.R. §§ 133.41-.45 or to the conduct of Customs under such regulations is perhaps more appropriately addressed to the Court of International Trade in which exclusive jurisdiction of such matters is vested. *See* 28 U.S.C. § 1581.

On March 18, 1986, JRL filed a protest pursuant to Section 514 of the Tariff Act of 1930 with the office of the Customs District Director, Milwaukee District, which had seized the shipments in question. According to an affidavit of the Acting District Director, on March 21, 1986 "the seizures were cancelled and changed to detentions in accordance with 19 C.F.R. 133.43." [1] The affidavit further indicates that Tonka was notified of the detentions and that

> [b]y letter dated April 25, 1986, Tonka Corp. properly transmitted the necessary bonds, totalling $120,000.00, to preclude release of the merchandise in accordance with 19 C.F.R. 133.43(c)(1). * * *. The bond amount represents the entered value of the merchandise available for detention as of February 25, 1986. Tonka's letter dated April 29, 1986 provided a written demand for exclusion from entry of the imported articles.[2]

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[1] Section 603(c) of Title 17, U.S.C. states that "[a]rticles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws." Subsection (a) of 19 C.F.R. § 133.43 provides, in part:

> * * * If the district director has any reason to believe that an imported article may be a piratical copy of a recorded copyrighted work, he shall withhold delivery * * *.

[2] Affidavit of Paul N. Draeger, Jr., para. 13 (May 15, 1986) (citations omitted).

Finally, the affidavit states that JRL and Tonka were notified that they had until May 13, 1986 "to submit further evidence concerning the claim of piratical copying" [3] and that the file was then transmitted to Washington "for a decision on the disputed claim * * * in accordance with 19 C.F.R. 133.43." [4]

The plaintiffs commenced this action, alleging jurisdiction pursuant to 19 U.S.C. § 1581(a) and making an immediate application for a preliminary injunction. The defendants countered with a motion to dismiss on the ground of lack of subject-matter jurisdiction.

I

At the hearing held on the motions, the plaintiffs abandoned any request for immediate release of the merchandise already under detention.[5] Rather, as articulated by counsel, the plaintiffs "seek to prevent Customs from detaining future imports of merchandise, or entering into the question of copyright validity." Tr. at 12. In other words, the relief sought is "[j]ust the status quo, pending the District Court proceedings." *Id.* at 14.

This court is not persuaded that it has jurisdiction to grant the preliminary relief requested. That is, the Tariff Act of 1930, 19 U.S.C. § 1514, does not provide for the filing of protests as to future entries. *See, e.g., Sanho Collections, Limited* v. *Chasen,* 1 CIT 6, 505 F.Supp. 204 (1980); *Wear Me Apparel Corporation* v. *United States,* 1 CIT 194, 511 F.Supp. 814 (1981). On the other hand, the Customs Courts Act of 1980, 28 U.S.C. § 1581(i), granted this Court of International Trade residual jurisdiction over import matters, including prospective entries. *See, e.g., Vivitar Corporation* v. *United States,* 7 CIT 170, 585 F.Supp. 1419 (1984). But this grant cannot be used to bypass administrative review by meaningful protest—unless the available remedy is manifestly inadequate. *Compare United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467 (1982), *with United States Cane Sugar Refiners' Association* v. *Block,* 69 CCPA 172, 683 F.2d 399 (1982).

In this action, Customs has detained plaintiffs' merchandise, and they have protested, as contrasted with *Vivitar,* where the Service refused to exclude merchandise bearing the plaintiff's trademark, thereby leaving that allegedly aggrieved markholder without ground to protest pursuant to 19 U.S.C. §1514. *See* 585 F.Supp. at 1424–25. Thus, the traditional administrative remedy afforded by the Tariff Act of 1930, with subsequent judicial review under 28 U.S.C. § 1581(a), was manifestly inadequate. Such is not the case here.

Furthermore, in *Vivitar* it was clear from the language of Customs' own regulation, 19 C.F.R. § 133.21(c), and from the Service's performance thereunder that so-called gray-market goods would

[3] *Id.,* para. 14.
[4] *Id.,* para. 15.
[5] *Compare* plaintiffs' Motion for a Preliminary Injunction *with* Tr. at 4, 12 and 14.

not be seized pursuant to statutory authority, 19 U.S.C. § 1526. *See generally Vivitar Corporation* v. *United States,* 8 CIT 109, 593 F.Supp. 420 (1984), *aff'd,* 761 F.2d 1552 (Fed.Cir. 1985), *cert. denied,* 106 S.Ct. 791 (1986). In this action, the future performance of Customs is not nearly so predictable. On the one hand, the controlling Service regulation, 19 C.F.R. § 133.43(a), is broad, and the plaintiffs have produced a copy of a Customs communication dated March 13, 1986 to all District Directors to the effect that a copyright certificate obtained *after* importation (and seizure) of merchandise will not be accepted as "conclusive proof of original authorship".[6] On the other hand, in its denial of their protest, the Service assured the plaintiffs that "[e]ach [future] shipment imported will be reviewed on an individual basis, and only then would a determination be made whether the articles would be detained" [7] and that the detention was "limited" to the goods already seized. Moreover, complainant Tonka posted bonds to cover those shipments, and there is no reason to doubt that Customs will abide by its regulation, 19 C.F.R. § 133.43(b)(2), requiring security for any detention of future JRL imports. Finally, counsel stated at the hearing herein that trial of the Minnesota action would take place in July 1986.

In sum, the current circumstances of this action constitute no more of a factual basis for the grant of extraordinary equitable relief than does 28 U.S.C. § 1581(a) provide a proper jurisdictional predicate. Plaintiffs' application for a preliminary injunction must therefore be denied. *Cf. American Air Parcel Forwarding Co.* v. *United States,* 6 CIT 146, 573 F.Supp. 117 (1983).

II

Reaching the foregoing conclusion, however, does not lead the court to adopt the ultimate conclusion proposed by the defendants, to wit, dismissal of this action on the ground that the claims raised herein are exclusively the province of the Minnesota district court pursuant to 28 U.S.C. § 1338(a).

As shown above, page 2, the district judge does not share this viewpoint, nor does the Federal Circuit agree in its analysis and comparison of sections 1338(a) and 1581 of Title 28 in *Vivitar.*[8] Moreover, a recent comment on this point states that

> * * * [T]he mere fact that the case involves trademarks or copyrights does not mean that the Court [of International Trade] does not possess jurisdiction to review actions of the Customs Service which relate to trademarks or copyrights.[9]

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[6] Plaintiffs' Exhibit H. Here, JRL received its copyright certificate (under statutory threat of criminal sanction for false representation, 17 U.S.C. § 506(e)) after Customs had seized its goods, but the plaintiffs have apparently determined to permit the detention of that merchandise to run its course. In fact, Exhibit H simply states that the procedures provided in 19 C.F.R. §§ 133.42 and 133.43, as appropriate, will be followed.

[7] Draeger Affidavit, Exhibit 2 (letter from District Director dated April 9, 1986). *See* 17 U.S.C. § 410(c).

[8] *See generally* 761 F.2d at 1557-60. *Compare Coalition to Preserve the Integrity of American Trademarks* v. *United States,* 598 F.Supp. 884 (D.D.C. 1984), *rev d,* 790 F.2d 903 (D.C. Cir. 1986), *with Olympus Corporation* v. *United States,* 627 F.Supp. 911 (E.D.N.Y. 1985), *aff'd,* —— F.2d —— (2d Cir. June 9, 1986).

[9] Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction and Procedure: The Past Eighteen Months in Review,* U.S. Court of Int'l Trade Second Annual Judicial Conference, p. 140 (Oct. 23, 1985).

Defendants' further position that there has been no "exclusion" of merchandise herein and thus no protestable act on the part of Customs is also not conclusive. While the copyright law, 17 U.S.C. § 603(c), is the statutory underpinning of the regulations (and actions) of the Customs Service, that section itself is tied directly to the manner of enforcement of the "customs revenue laws", a term also found in section 514 of the Tariff Act of 1922. In *McKesson & Robbins (Inc.)* v. *United States,* 43 Treas.Dec. 214, T.D. 39511 (1923), the Board of General Appraisers held that the "exclusion" protest provision contained in that section 514 enabled an importer to obtain review of a collector's refusal to withdraw an opium shipment that was under warehouse entry in New York for transportation to New Orleans. The latter port was not designated for the importation of opium by the Federal Narcotics Control Board, which was composed of the Secretaries of State, Treasury and Commerce and empowered by the "Narcotic drugs import and export act" of 1922 to promulgate regulations restricting opium importation. Likewise, in *Wm. A. Brown & Co.* v. *United States,* 47 Treas.Dec. 862, T.D. 41001 (1925), the Board of General Appraisers denied a government motion to dismiss for lack of jurisdiction over a protest to a collector's decision to exclude opium-smoking pipe bowls since they were "articles of an immoral nature" prohibited from being imported.

In other words, the court's predecessor agency had jurisdiction to review protests precipitated in one instance by a controlled-substance law and in the other by a public morals law.

As indicated above, JRL interposed its protest pursuant to section 514 of the Tariff Act of 1930, specifically 19 U.S.C. § 1514(a)(4), which deleted the word "revenue" from the earlier section's usage of "customs laws". In *Norwood Imports* v. *United States,* 48 Cust.Ct. 1, C.D. 2306 (1961), the plaintiff invoked the court's jurisdiction as a result of a protest pursuant to that section 514 to claim that Customs had erroneously excluded artificial geraniums from entry into the country on the ground that they were piratical copies. It is unclear from the report of the decision whether jurisdiction was contested by the government, but, in any event, the court reached the merits in deciding the case.

The plaintiff in *Schaper Manufacturing Co.* v. *Regan,* 5 CIT 266, 566 F.Supp. 894 (1983), was a copyright owner. A controversy arose with Customs over release of bonds posted by the owner in conformity with 19 C.F.R. § 133.43(b)(2). In that case, as here, the defendants moved to dismiss on the ground of lack of jurisdiction, which motion was denied for the following reasons, among others:

> * * * [T]he subject matter of an action relating to the *existence* of a copyright alone does not suffice to grant exclusive jurisdiction to the United States District Court * * *. 5 CIT at 271, 566 F.Supp. at 898 (emphasis in original).

* * * * * * *

> * * * The jurisdiction of this court is not so evanescent as to preclude the plaintiff from seeking review with respect to the administration by customs of its regulations relating to the subject merchandise merely because some of the merchandise has been found by customs to be piratical in character. Whether the plaintiff may or may not intend to institute an action against the importer for "infringement" pursuant to the provisions of the copyright laws of the United States is not a matter that concerns this court. Until a claim for such "infringement" is made with an accompanying prayer for the relief provided by the copyright laws of the United States, no cause of action has been instituted within the exclusive jurisdiction of the United States District Court.[10]

The court in *Schaper* found two cases apparently relied on by the government, namely, *Bally/Midway Mfg. Co.* v. *Regan,* 5 CIT 237, 565 F.Supp. 1045 (1983), and *Kidco, Inc.* v. *United States,* 4 CIT 103 (1982), to be distinguishable. These cases are referred to again by the defendants herein, but this court concurs with the *Schaper* analysis. That is, in neither did the cause of action or claim for relief relate to the administration and enforcement of the Customs regulations governing the importation and/or exclusion of the particular merchandise in question. Rather, the relief sought appeared to be within district-court jurisdiction, and both actions were transferred accordingly.

The defendants also contend that the plaintiffs have failed to exhaust their administrative remedies in that the Commissioner of Customs has yet to decide whether to release the detained goods. However, the government admits that the Commissioner has an unlimited amount of time to reach a decision. *See* Tr. at 15. But courts have not permitted federal agencies to detain property for unlimited periods of time. For example, in *Gonzales* v. *Rivkind,* 629 F.Supp. 236 (M.D.Fla. 1986), the court held that the Immigration and Naturalization Service's conveyance detention procedures in enforcing 8 U.S.C. § 1324 which subject seized vehicles to "standard customs forfeiture provisions"[11] do "not comport with the minimum constitutional requirements of due process". 629 F.Supp. at 238. The court refused to condone

> a situation in which the government takes a man's automobile, tells him to go home and then holds the car while administrative persons review the seizure to decide whether to press charges or proceed to forfeiture. The decision making process alone may take weeks or longer under the present program. 629 F.Supp. at 239.

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[10] 5 CIT at 271-72, 566 F.Supp. at 899. This conclusion is preceded by a representation that the government considered exclusion of merchandise on the ground of piracy to be protestable pursuant to 19 U.S.C. § 1514. The court denied a subsequent motion for reconsideration of this point in 6 CIT 24 (1983), characterizing the motion as a "changed position" on the part of the defendants which did not warrant reversal of the decision in view of the gravamen of the case.

[11] 629 F.Supp. at 237.

There was no procedure "to assure that a prompt probable cause determination before a neutral judicial officer is available to the owner of a seized vehicle." *Id.*

In *Azurin* v. *Von Raab,* Civil No. 86-0189 (D. Hawaii June 6, 1986), the court required Customs to release detained property of former Philippines president Ferdinand Marcos. There the Service had argued that the plaintiffs lacked a remedy since detentions are not protestable, but the court recognized that by not making "any final protestable decision, defendant can indefinitely detain the merchandise and evade any challenge by plaintiffs through administrative procedures." Slip op. at 24.

In *Azurin,* the district court exercised jurisdiction pursuant to 28 U.S.C. § 1361 as a result of the plaintiffs' failure to allege "any duty arising out of a customs law or regulation by which the defendant is compelled to release the merchandise" [*id.* at 7] and the judge's conclusion that "this action for mandamus cannot arise from a Customs law or regulation." [12]

The same cannot be said for the action at bar. However narrow the definition of "exclusion of merchandise * * * under any provision of the customs laws" within the meaning of 19 U.S.C. § 1514(a)(4), such definition still encompasses the acts of Customs complained of herein. Furthermore, if exclusive jurisdiction is anything more than an element of defendants' advocacy, the district court which will decide the competing copyright claims considers such jurisdiction to rest with this court insofar as plaintiffs' grievances with the Service are concerned.

To reiterate, in view of the foregoing, plaintiffs' application for a preliminary injunction and defendants' motion to dismiss the complaint on the ground of lack of subject-matter jurisdiction must both be denied.

So ordered.

(Slip Op. 86-70)

SIMOD AMERICA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consol. Court No. 85-05-00649

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff moves pursuant to 28 U.S. § 256(b) and USCIT Rule 77(c)(3) for the chief judge to authorize a judge of this court to hold an evidentiary hearing in Padova, Italy. Plaintiff contends that on-site view of manufacturing processes in factory in Italy is essential to plaintiff's case, and that important witnesses are available in Italy.

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[12] Slip op. at 8. The district court rendered its decision notwithstanding this Court of International Trade's subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(i) to grant the same mandamus relief as to the Marcos property. *See Azurin* v. *United States,* 10 CIT ——, 632 F.Supp. 30, 31 (1986).

Held: The chief judge is authorized to order an evidentiary hearing in a foreign country upon a showing that "interests of economy, efficiency, and justice will be served" thereby. In this case, plaintiff's motion is premature because issues pertaining to discovery remain unresolved and plaintiff has not made a showing that alternative means of presenting the desired evidence are inadequate. Since the motion is premature, the motion to authorize a hearing in the foreign country is denied without prejudice.

[Plaintiff's motion denied without prejudice.]

(Dated July 16, 1986)

Rode & Qualey (Michael S. O'Rourke) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Barbara M. Epstein),* for the defendant.

Re, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Italy, and described on the customs invoices as shoe "uppers."

The merchandise was classified by the Customs Service as unfinished footwear under TSUS item 700.67 or 700.35, depending upon the amount of leather on the exterior surface.

Plaintiff has protested the classification, and contends that the merchandise is properly classifiable as shoe "uppers" under TSUS items 386.07, 386.50, or 386.04, or under TSUS items 791.90 or 791.27, depending on the leather content. Although the duties assessed and claimed varied depending on the amount of leather on the exterior surface, the duties on unfinished footwear are considerably higher than those assessed for parts or components of shoes.

Plaintiff contends that the Customs Service erred in determining that the imported shoe "uppers," which contained an underfoot or midsole, were substantially complete, and thus were classifiable as unfinished footwear. Rather, plaintiff submits that the imported merchandise required substantial additional manufacturing processes in the United States before it could be sold as footwear. Relying upon *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States,* 66 CCPA 97, C.A.D. 1228, 600 F.2d 799 (1979), plaintiff urges that the nature, extent, and relative value of these additional manufacturing processes, in the United States, prevent classification as unfinished footwear, and require that the merchandise as imported be classified as parts or components of shoes or shoe "uppers." *See also Authentic Furniture Prod., Inc.* v. *United States,* 68 Cust. Ct. 204, C.D. 4362, 343 F. Supp. 1372 (1972), *aff'd,* 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973).

Pursuant to 28 U.S.C. § 256(b) (1982), and USCIT R. 77(c)(3), plaintiff has made a motion that the chief judge of the United States Court of International Trade authorize a judge of this Court to preside at an evidentiary hearing in Padova, Italy. Plaintiff maintains that the hearing in Padova will afford the court an opportunity "to view the manufacturing process in issue * * * and to receive testimony relating to the diverse and complex manufacturing processes associated with the creation of finished footwear."

In essence, plaintiff contends that an on-site view of these manufacturing processes is critical in carrying its burden of proof that the merchandise as imported could not be classified as unfinished footwear.

Plaintiff states that it operated a factory in Middletown, Rhode Island, and, utilizing a Desma twenty-four station bidensity polyurethane injection molding machine, manufactured sneakers and tennis shoes from the shoe "uppers" imported from Italy. Plaintiff further states that the decision by Customs to classify the shoe "uppers" in issue as unfinished footwear, made it uneconomical for it to continue to manufacture athletic footwear at the Middletown factory. The resulting economic hardship caused the factory to close.

According to plaintiff, only one other manufacturer in the United States uses the Desma injection molding technique, and that manufacturer is unwilling to allow competitors or other outside parties to view its factory. Although other American manufacturers use the injection molding process, their equipment is incompatible with the Desma injection molding technique.

Plaintiff maintains that the layout and manufacturing processes at the Middletown factory were identical in all respects to those at the factory of plaintiff's parent company in Padova, Italy. In addition, several of plaintiff's principal witnesses are presently employed at the Padova factory, and to require that they travel to the United States to testify at trial would impose an economic hardship upon the plaintiff. Therefore, plaintiff urges that Padova is the only place where the court may observe the manufacturing processes to which the imported shoe "uppers" were subjected at the Middletown factory, and also obtain the testimony of key witnesses.

Defendant acknowledges that the chief judge has the statutory authority to order an evidentiary hearing in Padova, but contends that the facts and circumstances of this case do not warrant such a hearing at this time. Defendant opposes plaintiff's motion on several grounds. Initially, defendant maintains that the motion is premature because the parties have not completed discovery.

Assuming *arguendo* that plaintiff's motion is timely, defendant contends that plaintiff has failed to make the requisite showing that "the interests of economy, efficiency and justice" will be served by holding a hearing in Padova. The defendant submits that plaintiff has not demonstrated that its manufacturing processes are "so special" that they require that the chief judge exercise the statutory authority under 28 U.S.C. § 256(b) to authorize a hearing abroad. Moreover, defendant maintains that plaintiff has not established that the processes and machinery in Padova are identical to those at plaintiff's Middletown factory, and thus relevant to the issues in this case.

Defendant also alleges that plaintiff has not substantiated its assertions that the witnesses who are "critical" to its case could not

be present at a trial in the United States to testify about the manufacture of athletic footwear utilizing the Desma injection molding technique on the shoe "uppers" in issue. Defendant submits that one of plaintiff's primary contentions is that it would be costly for plaintiff to bring its witnesses to the United States to testify at a trial. For the chief judge to authorize the holding of a hearing in Padova, on this basis, would, in defendant's view, serve to transfer the cost and inconvenience from the plaintiff to the defendant and the court. In addition, the defendant states that plaintiff has not provided the court with any evidence that Italy has no objection to an evidentiary hearing of the type contemplated by section 256(b). Nevertheless, the defendant requests that, if the plaintiff's motion is granted, the court should order plaintiff to bear a portion of the additional expenses incurred by defendant in traveling to Padova.

When a trial or hearing before this Court is sought to be held outside New York City, 28 U.S.C. § 256 authorizes the chief judge to designate a judge of the court to preside at any place within the jurisdiction of the United States, or at an evidentiary hearing in a foreign country. Section 256(b), in particular, provides that:

> Upon application of a party or upon his own initiative, and upon a showing that the interests of economy, efficiency, and justice will be served, the chief judge may issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country whose laws do not prohibit such a hearing: Provided, however, That an interlocutory appeal may be from such an order pursuant to the provisions of section 1292(d)(1) of this title, and the United States Court of Appeals for the Federal Circuit may, in its discretion, consider the appeal.

28 U.S.C. § 256(b)(1982).

A motion for an evidentiary hearing in a foreign country under 28 U.S.C. § 256(b) is comparable to a request, pursuant to 28 U.S.C. § 256(a), for a trial or hearing at a place within the United States other than New York City. It is obvious that a party cannot, as a matter of right, select the venue for a trial or hearing before the court. *See Shannon Luminous Material Co.* v. *United States*, 69 Cust. Ct. 317, 319, C.R.D. 72-21, 349 F. Supp. 1000, 1003 (1972). To the contrary, it is clear that, pursuant to the statutory authority, the granting of a request for a trial or hearing outside New York City lies within the sound discretion of the chief judge. 69 Cust. Ct. at 320, 349 F. Supp. at 1004. The courts have long recognized this principle or policy of customs jurisprudence. In *United States* v. *Sanchez*, 15 Ct. Cust. Apps. 443, T.D. 42642 (1928), the Court of Customs Appeals stated that:

> The business of the * * * Court is so extensive that disorder and inefficiency would quickly result if assignment of cases and places of hearing were not constantly within the control of some centralized authority with that court.

Id. at 448, *quoted in Shannon Luminous,* 69 Cust. Ct. at 321, 349 F. Supp. at 1005.

Whether the trial or hearing is requested to take place in the United States, or in a foreign country, the chief judge will consider a variety of factors in exercising the statutory authority and responsibility to authorize a trial or hearing outside the City of New York. Among the factors to be considered are: (1) the procedural posture of the litigation; (2) the question presented, and whether the issues in dispute are of fact or law; (3) the availability and convenience of the witnesses of both parties; (4) the availability of alternate means to obtain the evidence and testimony that may be presented outside of New York City; (5) the importance and relevance of the place of manufacture of the merchandise in issue, and the port of importation; (6) the cost to the parties and the court; and (7) the importance of the case to the parties, as well as the public interest.

Section 256(b) has its origins in the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 277 (1970). In enacting section 256(b), Congress granted the chief judge discretionary authority to issue an order authorizing a judge of the court to preside at an evidentiary hearing in a foreign country. The exercise of this statutory authority presupposes that there has been a showing, to the satisfaction of the chief judge, that the hearing would serve "the interests of economy, efficiency and justice." S. Rep. No. 576, 91st Cong., lst Sess. 16 (1970); *see also* H.R. Rep. No. 1067, 91st Cong., lst Sess. 15-16 (1970).

The public interest in reaching a legally correct and just determination as to the lawful classification of the imported merchandise is substantial. In this litigation alone, the plaintiff alleges that over $700,000 in disputed duties are at stake. It is also relevant that the Footwear Division of the Rubber Manufacturers Association, Inc., a trade association representing domestic manufacturers of rubber and plastic soled footwear, has requested, and been granted, leave to file a brief *amicus curiae* in support of the plaintiff's position on the merits. It also may be observed that the expense and time necessary to hold a hearing in Italy may not be disproportionate to those incurred in holding a trial at certain ports in the United States.

When appropriate factors or circumstances are shown to the satisfaction of the chief judge, before exercising the statutory authority and responsibility, the chief judge will determine whether the foreign country will permit a hearing of the type requested. Indeed, Congress clearly contemplated that the chief judge, rather than the parties, "will work closely with the State Department to assure that the host country has no objection to holding the evidentiary hearing within its boundaries." H.R. Rep. 1067, at 15. On this point, the court may take judicial notice of the commendable degree of cooperation that exists between the United States and

Italy in matters of judicial assistance. *See, e.g., Treaty on Mutual Assistance in Criminal Matters,* Nov. 9, 1982, United States—Italy, —— U.S.T. ——, T.I.A.S. No. ——; *Convention on Taking of Evidence Abroad in Civil or Commercial Matters,* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (codified at 28 U.S.C. § 1781 (1982)); *Convention on Service Abroad of Judicial and Extrajudicial Documents,* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 659 U.N.T.S. 163; *International Agreements: Two Treaties between The United States and Italy,* 26 Harv. Int'l L.J. 601 (1985); *see also* Fed. R. Evid. 44.1. Of course, should the motion be granted, the chief judge will undertake the necessary and appropriate procedures to hold the hearing in the foreign country.

The legislative history of section 256(b) suggests that Congress envisioned an evidentiary hearing in a foreign country within the context of a trial commenced in the United States. The advantage of this procedure is to afford the court the opportunity to view a site in cases in which an inspection by the court is relevant to the issues in litigation. It is axiomatic in customs law that a sample can be a potent witness. *See United States* v. *May Department Stores Co.,* 16 Ct. Cust. Apps. 353, 356, T.D. 43090 (1928); *Marshall Field & Co.* v. *United States,* 45 CCPA 72, 81, C.A.D. 676 (1958). Similarly, when relevant, an on-site viewing or inspection can be of inestimable value in permitting the court to learn and evaluate the various processes involved in the manufacture of the imported merchandise, as well as the merchandise's intended use. *See, e.g., Pistorino & Co.* v. *United States,* 82 Cust. Ct. 168, 172, C.D. 4799 (1979); *Dolliff & Co.* v. *United States,* 81 Cust. Ct. 1, 2, C.D. 4755 (1978); *see also Northwestern National Casualty Co.* v. *Global Moving & Storage, Inc.,* 533 F.2d 320, 323 (6th Cir. 1976) (trial courts possess inherent authority to conduct on-site view of area in litigation); IV Wigmore on Evidence § 1162 (1972). Certainly, the authority to order such viewings resides in the sound discretion of the court. 533 F.2d at 323. Moreover, the court may observe the witnesses whose testimony is taken abroad and evaluate that testimony in light of the entire record. S. Rep. No. 576, at 15–16.

In this case, on the present procedural posture of the litigation, plaintiff's motion for an evidentiary hearing in Padova, Italy, is premature. Certain issues pertaining to pretrial discovery, including possible depositions of plaintiff's witnesses, remain unresolved. There are issues that may be resolved by mutual agreement between counsel for the parties. Hence, at this time, the court cannot conclude that the plaintiff has made the necessary showing that a hearing abroad would serve "the interests of economy, efficiency and justice."

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied without prejudice; and it is further

ORDERED that within 30 days of this order, the parties shall submit to the court a schedule for the completion of pretrial discovery and the submission of any pre-trial motions; and it is further

ORDERED that within 30 days after the completion of pretrial discovery, plaintiff shall file a request for trial, which may include a renewed request for an evidentiary hearing in Padova, Italy.

(Slip Op. 86-71)

INTERNOR TRADE INC. AND PETROBAS COMERCIO INTERNATIONAL S.A. INTERBRAS, PLAINTIFFS *v.* UNITED STATES AND MALCOLM BALDRIGE, SECRETARY OF COMMERCE, DEFENDANTS

Court No. 86-04-00510

MEMORANDUM AND ORDER

[Defendants' motion (1) to extend time to file record granted in part and (2) to file record on microfilm denied; plaintiffs' motion to extend time to respond to defendants' motion to dismiss granted in part and denied in part.]

(Dated July 16, 1986)

Rogers & Wells (Eugene T. Rossides and *Robert E. Ruggeri)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth C. Seastrum)* for the defendants; *Andrea E. Migdal,* U.S. Department of Commerce, of counsel.

AQUILINO, *Judge:* The court is in receipt of an untimely motion by the defendants to extend their time to file the administrative record until 45 days after decision of their earlier motion to dismiss the complaint. Were it not for the fact that the relief requested is clearly in the interest of orderly and efficient proceedings herein, the motion to extend would be denied.

I

Both the Customs Courts Act of 1980, 28 U.S.C. § 2635(b)(1), and CIT Rule 71(a) require that the record in an action such as this be filed within 40 days after service of the complaint, which apparently occurred in this action on May 20, 1986. The defendants compute their filing deadline to have been July 3, 1986,[1] the date on which their instant motion for an extension was served.

Such motions are governed by CIT Rule 6(b), subparagraph (2) of which provides:

> The motion for extension of time must set forth the specific number of additional days requested, the date to which the extension is to run, the extent to which the time for the performance of the particular act has been previously extended, and

[1] *See* Defendant's Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm, [hereinafter cited as "Defendants' Memorandum"], p. 1.

> the reason or reasons upon which the motion is based. *The motion shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates* (including any previous extension of time); except, when for good cause shown, the delay in filing was the result of excusable neglect or circumstances beyond the control of the party. [emphasis added]

Defendants' motion was received in the Clerk's office on July 8, 1986 and thereafter referred to this court for disposition. Self-evidently, the motion does not meet the dictate of Rule 6(b)(2) underscored above, notwithstanding the provisions of CIT Rules 5(g) and 6(c) regarding timing. Rather, the dictate is that motions for extensions of time, which require prompt attention, be made far enough in advance of deadlines so as to afford the court at least some time within the litigants' periods to perform to decide them.[2] Otherwise, parties like the defendants herein could automatically extend the time mandates of Congress and this Court of International Trade.

The motion at bar does not call into account the exceptions contained in Rule 6(b)(2) ("excusable neglect" or "circumstances beyond the control of the party"). On June 11, 1986, the defendants served their motion to dismiss on the ground of lack of subject-matter jurisdiction over this action where the International Trade Administration (ITA) has reached a final affirmative antidumping-duty determination,[3] but where the International Trade Commission has reached a final negative determination[4] that the domestic industry is being materially injured, or threatened with material injury, by reason of the dumped imports.[5] This being the primary reason for defendants' request for an extension of time, it could have and should have been made around June 11, 1986—definitely not on July 3rd.

The interest of orderly and efficient proceedings which is raised by defendants' request is of sufficient moment on its face, however, to transcend the method of its presentment. That part of their motion which seeks an extension of time to file the administrative record until after determination of the dispositive motion should therefore be granted.

Microfilmed Record

Defendants' motion contains a secondary request, couched as follows:

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[2] To the extent the time required for decision goes beyond the deadline sought to be extended, Rule 6(b)(4) protects the movant in the event of denial. Indeed, the 10 days provided therein constitute a good rule of thumb for the minimum length of time in advance for the making of motions for extensions, certainly where they are contested [*compare* CIT Rule 7(d)] or the period to perform the act is as lengthy (40 days) as herein.

[3] *See Antidumping; Fuel Ethanol From Brazil,. Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 5572 (Feb. 14, 1986).

[4] *See Import Investigations; Ethyl Alcohol From Brazil,* 51 Fed. Reg. 9538 (March 19, 1986); USITC Pub. 1818 (March 1986).

[5] The plaintiffs herein seek judicial review of the ITA's determination.

> * * * If * * * the Court rules against the Government * * * then the ITA will need an additional 45 days to finalize the record, prepare the index, send it to the microfilmer, and review the microfilm tapes for accuracy.[6]

Of course, insofar as the request for leave to submit microfilm is contingent upon the filing deadline for the administrative record, the court's decision to grant the extension of time makes that matter moot. However, issues raised remain.

Clearly, the ITA is free to process and maintain its record as it deems appropriate. But agency expediency is not, in itself, ground for extension of the time for filing that record mandated by both Congress[7] and this Court of International Trade. Although the ITA may well labor under a heavy paper burden in view of the nature and number of proceedings within its area of responsibility, counsel make no showing what distinguishes the agency record here from the records in other proceedings.

Furthermore, while the defendants are correct when they indicate that the Clerk's office now has "technical facilities which will allow persons to review a microfilm copy of the record", this court is convinced that, however refined those facilities may be, they do not enhance actual review by parties, the court, or the public, of individual elements of the record; only its overall handling and storage, which, admittedly, can be compelling considerations. Therefore, defendants' request to microfilm should be denied without prejudice.

II

For their part, the plaintiffs have served and filed a motion for an extension of time to respond to defendants' motion to dismiss which complies with Rule 6(b)(2).[8] The motion falls short on the merits, however. That is, it seeks an extension that would run until 35 days after another judge has decided another government motion to dismiss another, unrelated action. While the gravamen of that motion is apparently the same as the one defendants have posited herein, and while this Court of International Trade consistently makes every effort to administer justice as efficiently as practicable, the plaintiffs have failed to bear their burden of persuasion that the mere existence of a similar issue of law in another action is ground for an extension of time to be delimited by that action rather than by the one they have brought to court. In other words, a plaintiff's response to a motion to dismiss its action generally

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[6] Defendants' Memorandum, p. 2. This memorandum goes on to state at page 3:

> The ITA proposes to reproduce the record in microfilm and to submit a microfilm copy to the Court because this procedure will make the record easier to compile, deliver and maintain. It will also relieve some of the practical problems ordinarily encountered when working with large quantities of papers. Defendant has been advised that the Court has technical facilities which will allow persons to review a microfilm copy of the record at the Court.

[7] Indeed, the congressional intent is that there be expeditious judicial review of agency determinations of important international trade matters.

[8] The motion was deemed filed 14 days before the deadline in question, thereby affording the court adequate time to consider it.

should not abide the outcome of a motion to dismiss another action, and that is true here as well.

In any event, implicit in plaintiffs' motion, however timely made, is the need for an additional period for response to the motion to dismiss. Apparently, the position of the defendants is that "they 'do not consent to but will not object to the Motion.'" [9]

Now, therefore, in view of the foregoing, and after due deliberation, it is

ORDERED that that part of defendants' Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm as requests an extension of time to file the administrative record until after the court has decided defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated June 11, 1986 be, and it hereby is, granted; and it is further hereby

ORDERED that the administrative record be filed within 40 days of any denial of defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction dated June 11, 1986; and it is further

ORDERED that that part of defendants' Motion for Extension of Time for Filing the Administrative Record and for Leave to File the Record on Microfilm as requests leave to file the administrative record on microfilm be, and it hereby is, denied, without prejudice; and it is further

ORDERED that plaintiffs' Motion for Extension of Time to File Response to Defendants' Motion to Dismiss be, and it hereby is, granted to the extent that the plaintiffs shall have until August 15, 1986 to serve and file any such response.

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[9] Plaintiffs' Motion for Extension of Time to File Response to Defendants' Motion to Dismiss, pp. 2-3.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HEL
				Item No. and rate	Item No.
C86/109	Restani, J. June 25, 1986	FAG Bearings, Ltd.	80-8-01310	Item 680.35 1.7¢ per lb. plus 7.5%	Item 680.3 6%
C86/110	Restani, J. June 26, 1986	FAG Bearings, Ltd.	83-12-01745	Item 680.39 9.8%	Item 680.3 5.1%
C86/111	Restani, J. June 26, 1986	FAG Bearings, Ltd.	84-6-00787	Item 680.39 9.8%	Item 680.3 5.1%
C86/112	Restani, J. June 26, 1986	FAG Bearings, Ltd.	85-8-01000	Item 680.39 9.8%	Item 680.3 4.9%

FICATION DECISIONS

HELD m No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
n 680.33 %	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
n 680.33 .1%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
n 680.33 .1%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts
n 680.33 .9%	FAG Bearings Ltd. v. U.S. S.O. 85-52	Detroit Combination ball/roller bearings with integral shafts

ABSTRACTED VALUATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/186	Newman, S.J. June 24, 1986	Ford Motor Co.	85-7-00943	Transaction value	U
V86/187	Watson, J. June 25, 1986	Durlacher & Co.	269893A, etc.	Export value	E
V86/188	Watson, J. June 25, 1986	Nichimen Co.	R62/3877	Export value	A
V86/189	Watson, J. June 25, 1986	Starlight Trading Inc.	R61/13708, etc.	Export value	A
V86/190	Watson, J. June 26, 1986	Domast Inc.	R65/6472	Export value	E
V86/191	Watson, J. June 26, 1986	Durlacher & Co.	270431A, etc.	Export value	A
V86/192	Watson, J. June 26, 1986	Durlacher & Co.	283336A, etc.	Export value	A
V86/193	Watson, J. June 26, 1986	Durlacher & Co.	290684A, etc.	Export value	A

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	U.S. $5,612.96	Agreed statement of facts	Champlain Rouses Point, N.Y. Automobile parts
	F.o.b. unit in voice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarfs
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Sewing machine parts
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Cotton blouses
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Radios
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarfs
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarfs
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Rayon fabric

V86/194	Watson, J. June 26, 1986	Judson Sheld-on Int'l Corp.	R65/23279, etc.	Export value
V86/195	Watson, J. June 26, 1986	M.G. Deppe & Co.	R61/12503, etc.	Export value
V86/196	Watson, J. June 26, 1986	National Silver	R59/15357	Export value
V86/197	Watson, J. June 26, 1986	Nichimen Co.	R59/11255, etc.	Export value
V86/198	Watson, J. June 26, 1986	Providence Import Co.	R62/3169, etc.	Export value
V86/199	Watson, J. June 26, 1986	Providence Import Co.	R64/18524	Export value
V86/200	Watson, J. June 26, 1986	Trans-Oceanic Importing Corp.	R61/17041	Export value
V86/201	Watson, J. June 26, 1986	Trans-Oceanic Imports Co.	R64/3864, etc.	Export value
V86/202	Watson, J. June 26, 1986	Veri Best Trading Corp.	R62/13676	Export value

F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Tiles
Appraised values less 7.5% thereof	Agreed statement of facts	San Francisco Binoculars
Appraised values less 7.5% thereof	Agreed statement of facts	San Francisco Flatware
Appraised values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
Appraised values less 7.5% thereof	Agreed statement of facts	New York Rugs
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Tube rugs
Appraised values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Transistor radios; together with their accessories and parts; an entirety
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angles Tube mats, etc.
F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Bedford Knives and forks

Appeals to the U.S. Court of Appeals for the Federal Circuit

Ceramica Regiomontana, S.A. v. United States, 10 CIT —, Slip Op. 86-58 (May 29, 1986), *appeal docketed,* No. 86-1441 (Fed. Cir. July 8, 1986).

Bingham & Taylor v. United States, No. 85-7-00909 (CIT June 3, 1986), *appeal docketed,* No. 86-1140 (Fed. Cir. July 8, 1986).

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The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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